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09/719,620	12/14/2000	Johannes Alphonsus Van Hegelsom	U013111-0	3530

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EXAMINER

DAWSON, GLENN K

ART UNIT

PAPER NUMBER

3761

DATE MAILED: 08/26/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

09/719,620

Applicant(s)

VAN HEGELSOM, JOHANNES  
ALPHONSUS

Examiner

Glenn K Dawson

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 07 August 2003.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 55-90 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 55-90 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
\* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).  
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_. 6) ☐ Other: \_\_\_\_\_

***Continued Examination Under 37 CFR 1.114***

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114.

***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 60,67 and 73 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In claim 60, there is no antecedent basis for "the attachment straps".

In claim 67, it is unclear if the tube is being positively recited.

In claim 73, the slots being "vertical" is indefinite given no reference point.

***Claim Rejections - 35 USC § 101***

35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

Claims 55-90 are rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter.

Claims 55 and 88 state that the tube is fixed to the patients mouth.

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 55,56,67-70,75,81,84 and 85 are rejected under 35 U.S.C. 102(b) as being anticipated by Rogers-'881.

Rogers discloses an assembly to hold a tube in place in the user's mouth. The assembly has a positioning plate 18 and two clamping members 22a, 22b which are hingedly attached by hinge 24. One of the semicircular members 22a is integral with the plate. A clip 26 acts to hold the clamping members closed around a tube 114 held therein. Closing of the second clamping member relative to the first member clamps the tube in place. A strap 20 acts to stabilize the plate by being placed around the user's head.

Claims 55,56,67-71,75 and 81-84 are rejected under 35 U.S.C. 102(b) as being anticipated by Nestor, et al.-529.

Nestor discloses an assembly for holding a tube E in place in a user's mouth. The assembly includes a plate 12 and two semicircular clamping members 18,19 which are hingedly attached to each other at living hinge 20. Both of the members are integral with the plate. Straps 23,24 are placed about the user's head to further stabilize the plate relative to the user's mouth and head. If one so desired, one could hold clamp 18 in place (not moving relative to plate 12) and merely pivot the 2<sup>nd</sup> clamp member 19

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about hinge 20 to close the clamping means about the tube. Even though this is not disclosed, it is clear from the disclosure and figures that one could use the device in this manner. As the prior art has the ability to perform in the claimed manner, it meets the claim limitations.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claim 85 is rejected under 35 U.S.C. 103(a) as being unpatentable over Nestor-'529.

Nestor discloses the method as claimed with the exception of keeping the 1<sup>st</sup> clamp fixed to the plate. However, the examiner contends that given the fact that one could perform the claimed method step with the prior art reference, that one would have found it obvious to actuate the clamp by only moving one member instead of two as merely an obvious alternative method step to close the clamp. Doing so would tend to

stabilize the entire device while clamping was completed and would not require that the plate be stabilized by some other means while clamping.

Claims 72-74 are rejected under 35 U.S.C. 103(a) as being unpatentable over Nestor-'529 in view of Islava-'985.

Nestor discloses the invention as claimed with the exception of the plate having slots to receive ends of the straps. Islava discloses a plate for holding a tracheal tube which has slots<sup>186</sup> for receiving the ends of head straps. It would have been obvious to have used slots instead of pins 25 to attach straps 23,24 to the plate 12 of Nestor, as merely an obvious alternative means of attachment which would tend to reduce torsional stress between the straps and the plate.

Claims 76,79 and 80 are rejected under 35 U.S.C. 103(a) as being unpatentable over Nestor-'529 in view of Russo-'432.

Nestor discloses the invention as claimed with the exception of the bite member. Russo discloses a u-shaped bite member 25 on a tube holder. It would have been obvious to have placed the bite block of Russo onto the tube holder of Nestor as this would provide an additional stabilizing force for keeping the movement of the plate and tube holder relative to the user's head to a minimum.

Claims 72-74 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rogers, et al.-881 in view of Islava-'985.

Rogers discloses the invention as claimed with the exception of the plate having slots to receive ends of the straps. Islava discloses a plate for holding a tracheal tube which has slots<sup>186</sup> for receiving the ends of head straps. It would have been obvious to

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have used slots instead of pins 118 to attach strap 20 to the plate 18 of Rogers, as merely an obvious alternative means of attachment which would tend to reduce torsional stress between the straps and the plate.

Claims 76,79 and 80 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rogers, et al.-'881 in view of Russo-'432.

Rogers discloses the invention as claimed with the exception of the bite member. Russo discloses a u-shaped bite member 25 on a tube holder. It would have been obvious to have placed the bite block of Russo onto the tube holder of Rogers as this would provide an additional stabilizing force for keeping the movement of the plate and tube holder relative to the user's head to a minimum.

Claim 82 is rejected under 35 U.S.C. 103(a) as being unpatentable over Rogers, et al-'881 in view of Nestor-'529.

Rogers discloses the invention as claimed with the exception of the snap finger and cam means to lock the clamping members closed. Nestor discloses such an arrangement. It would have been merely an obvious alternative locking mechanism to use the one disclosed by Nestor instead of the one taught by Rogers, as a separate element (clip 26) is unnecessary.

### ***Response to Arguments***

Applicant's arguments filed 08-07-03 have been fully considered but they are not persuasive.

As noted in the above art rejection, Nestor's 1<sup>st</sup> clamping member could be held stationary relative to the plate while pivoting the 2<sup>nd</sup> clamping member to close the clamping members upon a tube.

The lower clamping member 22b of Rogers clearly has an upwardly bearing surface, top of flap 32, which supports the tube when closed. Neither of claims 55 or 85 claim that the positioning means extends both above and below the tube clamping members.

Both tube clamps of Nestor have upper surfaces which support the tube when closed. In addition, one could place the tube on either of the clamps with that clamp under the tube and with the positioning means positioned on the side of the tube, and then the positioning means and the other tube clamp could be pivoted relative to the first tube clamp held stationary to clamp the tube between the two clamps.

### ***Conclusion***

All claims are drawn to the same invention claimed in the application prior to the entry of the submission under 37 CFR 1.114 and could have been finally rejected on the grounds and art of record in the next Office action if they had been entered in the application prior to entry under 37 CFR 1.114. Accordingly, **THIS ACTION IS MADE FINAL** even though it is a first action after the filing of a request for continued examination and the submission under 37 CFR 1.114. See MPEP § 706.07(b).

Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within



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TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Glenn K Dawson whose telephone number is 703-308-4304. The examiner can normally be reached on M-Th 7:30-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Weilun Lo can be reached on 703-308-1957. The fax phone numbers for the organization where this application or proceeding is assigned are 703-305-3590 for regular communications and 703-306-4520 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0858.



Glenn K Dawson  
Primary Examiner  
Art Unit 3761

gkd  
August 24, 2003